SINGAPORE REPORTS

Singapore Finance Ltd & Anor v Matterhorn (Pte) Ltd & Ors

HIGH COURT (SINGAPORE) - ORIGINATING SUMMONS NO 290 OF 1988
THEAN J
6 JULY 1989

Land Law - Mortgage of land - Mortgagees prohibiting creation of leases by mortgagor - Tenancies granted in breach of prohibition - Whether mortgagee estopped by mere knowledge of tenancies from evicting tenants - Whether mortgagees estopped by conduct from evicting tenants - Whether prohibition ran with the land or merely contractual - Effect of Land Titles Act on position of unauthorized tenants - Land Titles Act (Cap 157, 1985 Ed), ss 63(3), 69(1) & 84(1) - Conveyancing and Law of Property Act (Cap 61, 1985 Ed), s 23(11)

The plaintiffs are mortgagees of five lots of land ('the property') on which is erected a building ('the building'). The building is owned by the first defendant. As security for loans extended to them by the plaintiffs, the first defendant executed five mortgages in favour of the plaintiffs. All five mortgages ('the mortgages') contained prohibitions against the letting out or leasing of the building or any part thereof by the first defendant without the prior written consent of the plaintiffs. Neither of the plaintiffs gave consent to the first defendant to lease any part of the building. The first defendant defaulted under the terms of the mortgages and the first plaintiff appointed receivers of the income of the building. Later, the plaintiffs took out an originating summons against the first defendant and obtained an order, inter alia, for delivery of vacant possession of the building to the plaintiffs. At the date of commencement of the proceedings, the building was let out to various tenants who formed the rest of the defendants. The first defendant delivered possession of the parts of the building occupied by them but the other defendants refused to do so. They were them added as defendants to the proceedings and the plaintiffs amended their originating summons to claim against these defendants an order for delivery of vacant possession of the parts of the building occupied by them respectively, mesne profits at a rate to be determined and costs. The defendants deny that they are trespassers and say that all material times, the plaintiffs were aware that the first defendant had let out the parts of the building to them, and that by their conduct, the plaintiffs have acquiesced in or consented to such letting. It was also contended that having regard to the provisions of the Land Titles Act ('the Act'), the plaintiffs are prevented or estopped from treating the defendants as trespassers. It was claimed that the prohibition in the mortgages against leasing parts of the building were merely a contractual restriction and did not run with the land.

Held, allowing the plaintiffs' claim:

(1) After hearing the evidence, the court found that there was no evidence that when the tenancy agreements were made, the plaintiffs knew that the first defendant had let out or agreed to let out the building. But the plaintiffs knew at all material times that the first defendant would be letting out or had let out parts of the building to tenants, and those tenants would be incurring expenses in fitting up their parts.

(2) In the cases cited, the mortgagees or their agents had done some positive acts and by these acts indicated that they accepted the mortgagor's tenant or consented to the tenancy created, in consequence of which a fresh tenancy was created between the tenant and the mortgagees.

(3) In this case, neither of the plaintiffs had done anything to indicate that they had consented to the tenancies or accepted the defendants as tenants. To constitute conduct amounting to consent of or acquiescence in the tenancies created, there had to be some positive act.

(4) As regards the position of the mortgagor's tenants under the Act, under s 84(1), the provisions of Part IV of the Conveyancing and Law of Property Act ('CLPA') apply, mutatis mutandis, to the mortgages and charges under the Act. Section 23 of the CLPA (which is in Part IV) gives powers to a mortgagor to create, inter alia, an occupation lease, but the powers created therein are expressly subject to the terms of the mortgage.

(5) It is also erroneous to say that the prohibition on the creation of tenancies is only contractual. As the mortgage is registered under the Act, any party dealing with the land has constructive notice of that term.

(6) In addition, s 69 of the Act refers to a mortgagee, on the default of the mortgagor, entering into possession of the land against the mortgagor and 'those claiming through or under him'. A tenant of the mortgagor whose tenancy is not binding on the mortgagee would come within these words. The position here under the Act is no different from the common law position.

(7) The defendants were thus ordered to deliver vacant possession of the parts of the building occupied by them. The defendants were also ordered to pay mesne profits which were to be assessed by the registrar. Arguments on costs would be heard.

Cases referred to

1 *Stroud Building Society* v *Delamont* [1960] 1 All ER 749 (distd)
2 *Chatsworth Properties Ltd* v *Effiom* [1971] 1 All ER 604 (distd)
3 *In re O'Rourke's Estate* (1889) 23 LR Ir 497 (folld)
4 *Parker & Ors* v *Braithwaite & Anor* [1952] 2 All ER 837 (folld)
5 *Taylor* v *Ellis & Anor* [1960] 1 Ch 368 (folld)
6 *Rimmon Watch Pte Ltd* v *Great Pacific Finance Ltd* [1989] 1 MLJ 265 (distd)

Legislation referred to

Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 23(1)
Land Titles Act (Cap 157, 1985 Ed) ss 63(3), 69(1), 84(1)

Anthony Lee with *Valerie Ong (Miss)* for the plaintiffs.
M Karthigesu with *A Karthigesu* for the second and third defendants.
M Karthigesu with *David Fones* for the fourth and fifth defendants.
Robert Wee for the sixth and eighth defendants.
Other defendants not represented.

Cur Adv Vult

Thean J: The relevant facts in this case, which are not in dispute, are these. The first and second plaintiffs are both mortgagees of the property comprising five plots of land, namely, lots 78-2, 79-2, 80-7, 80-3 and 428 of town subdivision 1 situate at Phillip Street, Singapore 0104, on

which was erected a ten-storey building called Matterhorn Building ('the building'). The property is owned by Matterhorn (Pte) Ltd, the first defendants ('Matterhorn'). They obtained loans from the first and second plaintiffs for the acquisition of the land and construction of the building. The building was completed at the beginning of January 1987 or thereabout. As security for the loans, they executed mortgages in favour of the first and second plaintiffs; a total of five mortgages were executed: three in favour of the first plaintiffs dated 18 August 1980, 19 June 1981 and 26 August 1982 respectively, and two in favour of the second plaintiffs dated 25 July 1981 and 23 August 1982 respectively. All the five mortgages contain provisions prohibiting the letting out or leasing of the property or any part thereof by Matterhorn without the prior written consent of the first plaintiffs or the second plaintiffs, as the case may be. The provision in the first mortgage in favour of the first plaintiffs containing such prohibition is in the following terms:

> That the borrower shall not have the power without the prior written consent of Singapore Finance to lease sub-lease or agree to let or sub-let or create any tenancy or licence or in any way part with possession of the mortgaged property or any part thereof.

The corresponding provisions in the two subsequent mortgages executed in favour of the first plaintiffs and the mortgages in favour of the second plaintiffs are all identical and are as follows:

> That the mortgagor will not sell, transfer, lease, license or agree to lease let license or part with possession of the mortgaged property or any part thereof and will not accept the surrender of any lease or licence without the prior written consent of the mortgagee which may be refused without reason or given either absolutely or on such terms and conditions including the payment of increased monthly instalments or additional interest as the mortgagee may deem necessary or advisable for the protection of its security and the decision of the mortgagee shall be final and conclusive and shall not be questioned on any account whatsoever.

It is common ground that neither of the plaintiffs gave any prior written consent to Matterhorn to let or lease the property or any part thereof to any person.

Matterhorn defaulted under the terms of the mortgages, and on 26 February 1988 the first plaintiffs appointed Messrs Peter Chi Mun Kwong and Bobby Chin Yoke Choong of Peat Marwick as receivers of the income of the property. About one month later, on 22 March 1988, both the plaintiffs took out this originating summons against Matterhorn, and on 15 April 1988 obtained an order, inter alia, for delivery of vacant possession of the property to the plaintiffs. At the date of commencement of these proceedings, ie 22 March 1988, Matterhorn had let out various units of the building to their tenants and in particular the following:

(a)	Second defendant (Toplis & Harding (S) Pte Ltd	#10-01 & #10-02
(b)	Third defendant (Design Phase Pte Ltd)	#09-01 & #09-04
(c)	Fourth defendant (Ad-Media Pte Ltd)	#09-02
(d)	Fifth defendant (IMBC Enterprises Pte Ltd)	#09-03
(e)	Sixth defendant (Golden Hope Commodities Pte Ltd)	#08-01 & #08-03
(f)	Seventh defendant (Alfa Asiatic Timber Pte Ltd)	#08-02
(g)	Eighth defendant (Swiftco Pte Ltd)	#06-01
(h)	Ninth defendant (Repro Office Automation Pte Ltd)	#05-02 & #05-03
(i)	Tenth defendant (Seah Say Yoong)	#05-04
(j)	Eleventh defendant (RTK Pte Ltd)	#04-02
(k)	Twelfth defendant (SMI Pte Ltd)	#04-04
(l)	Thirteenth defendant (Swiss Levingston (Property Consultant) Pte Ltd)	#06-04

Pursuant to the order, a writ of possession was taken out on 25 May 1988 and was executed on 8 June 1988 against Matterhorn who delivered to the plaintiffs possession of those parts of the building occupied by them and/or their associate companies. In respect of other parts of the building which were occupied by the tenants of Matterhorn, the tenants had refused to deliver possession thereof and the plaintiffs sought to execute the writ of possession. This was resisted; some of the tenants applied for leave to be added as parties to these proceedings and for a restraining order against the plaintiffs. The plaintiffs on their part also applied for leave to add 12 defendants (including those tenants who had applied to be added) as second to thirteenth defendants as parties to these proceedings and to amend the originating summons. There was no opposition to this application and an order was made in terms thereof; in respect of the applications by the tenants no order was made, the plaintiffs by their solicitors undertaking not to execute the writ of possession against the 12 defendants, namely, the second to the thirteenth defendants. By the amended originating summons, the plaintiffs claim against these 12 defendants the following reliefs:

(a) an order for delivery of vacant possession of the units of the building occupied by them respectively,
(b) mesne profits at the rate to be determined, and
(c) costs of the application.

The amended originating summons came on for hearing before the Chief Justice on 29 July 1988, and after hearing counsel for the respective parties at length, he made an order that the summons be adjourned to open court for

hearing and directed an issue to be tried, namely: 'The question of law whether knowledge per se by a mortgagee that the mortgagor had let or leased out part of the mortgaged property is sufficient to constitute deemed consent to the tenancies or leases granted by the mortgagor, as to preclude the mortgagee from treating the mortgagor's tenants as trespassers.' It appears that this issue was formulated by counsel for the plaintiffs and, after some arguments, was agreed to by counsel for the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth defendants; the tenth and thirteenth defendants were not represented and were not present before the learned Chief Justice. Before me, only the second, third, fourth, fifth, sixth and eighth defendants are represented and they are opposing the application of the plaintiffs. The seventh, ninth, tenth, eleventh, twelfth and thirteenth defendants are not represented and are not before me. All these 12 defendants will be referred to collectively in this judgment as the defendants (unless otherwise indicated).

At the commencement of the hearing, Mr Karthigesu for the second, third, fourth and fifth defendants addressed me on two points. First, he submitted that the issue directed to be tried was inadequate to resolve the matter in dispute. What the defendants are relying on is not only knowledge but the conduct overall of the plaintiffs. Mere knowledge is not enough to preclude the plaintiffs from treating the defendants as trespassers. He suggested that the issue should be reformulated and submitted a draft for the purpose. Secondly, he said that there was also another issue which would be argued by Mr Robert Wee on behalf of the sixth and eighth defendants, and that argument is based on the provisions of the Land Titles Act, as the titles to the property (except for lot 78-2 containing an area of 103.5 sq m) are held under the Act. Mr Lee for the plaintiffs urged me to proceed to try the issue as formulated by the parties and directed by the learned Chief Justice. On the material before me and on reflection, I agreed with Mr Karthigesu. The issue as framed - though apparently agreed to by the parties - does not raise any issue at all, because it seems to me clear that knowledge per se on the part of the plaintiffs that Matterhorn had let out parts of building to the defendants is not sufficient to constitute consent to the letting so as to preclude the plaintiffs from treating the defendants as trespassers. If that was the only issue to be decided I would without more ado give judgment to the plaintiffs, as there was nothing to be argued on behalf of the defendants. Regrettably, the party who formulated and those who agreed to the issue have not really considered in depth the matter in dispute. By the amended originating summons, the plaintiffs claim, inter alia, that the defendants are trespassers and the basis of their claim is that the plaintiffs are mortgagees of the property; that the mortgages prohibit the letting out of any part of the property without their consent; that the mortgagor, Matterhorn, let out various parts of the property to the defendants respectively; that no consent to any such letting has been given by the plaintiffs or either of them, and that consequently the plaintiffs as mortgagees are not bound by these tenancies. The defendants deny that they are trespassers. They say that the plaintiffs were at all material times aware that Matterhorn let out the various parts of the property to them; that the plaintiffs have by their conduct acquiesced in or consented to such letting, and that they are thereby precluded from treating the defendants as trespassers. Hence, the dispute calls for an investigation into the facts to ascertain the knowledge of the letting on the part of the plaintiffs and their conduct overall and a consideration of their effect in law; it involves a question of fact and law. To do justice to the matter before me I was compelled to reframe the issues for determination, and this I did. The issues framed by me (as subsequently amended) are as follows:

(1) Whether the plaintiffs, as mortgagees, at all material times, had knowledge specifically that the mortgagor, Matterhorn, had let out various parts of the building to the defendants as claimed or alleged by them respectively or knowledge generally that the mortgagor had let out to tenants various parts of the building.

(2) If the answer to the above is in the affirmative, whether the plaintiffs in the circumstances of the case are deemed to have consented to the tenancies to the defendants as claimed or alleged by them respectively, or in the alternative, whether the plaintiffs in the circumstances of the case are precluded from saying that they have not consented to the tenancies and from treating the defendants as trespassers.

Mr Robert Wee also suggested that a third issue be added, namely: whether having regard to the provisions of the Land Titles Act, the plaintiffs are prevented or estopped from treating the tenants of the mortgagor as trespassers. I could not see any objection to this issue being included for consideration, and, accordingly, I accepted it as a third issue for determination. The hearing then proceeded on the basis that these are the three issues to be tried. In this connection, Mr Lee on behalf of the plaintiffs submitted that the burden is on the defendants to establish their case on these issues, and that was accepted by Mr Karthigesu and also by Mr Robert Wee.

In addition to the evidence on the affidavits, Mr Karthigesu led viva voce evidence on behalf of the second defendants. Mr Chin Bay Kon, a director of the second defendants, was called. He testified that the second defendant negotiated with Jones Lang Wootton, the property agent of the building. He said that at that time the second defendant had their office at Central Building, which was owned (and presumably is still owned) by City Development Limited. When he and his colleagues went and

inspected the building some time in February 1987, he saw that it was just completed and some finishing works were still being done. There were then one or two tenants in occupation. He also saw a big signboard (presumably at the front of the building) put up by Jones Lang Wootton showing that they were the marketing agent for renting out the building. Having negotiated the terms of the lease, they proceeded to fit up their office in the building and were allowed four months to complete the works. According to him, the officer in charge of Central Building was aware that the second defendants would be moving to the building. The second defendants moved to the building at the end of May and commenced business thereat from 1 July 1987. After they had moved there, they had dealings with the second plaintiffs. The latter knew that the second defendants had their office in the building.

Mr Neo Lian Sun, the managing director of the second defendants, was also called. He said that the second defendants' lease of their office at Central Building expired by the end of May 1987 and they did not wish to exercise the option for renewal. He knew Mr Terry Tan, the assistant managing director of City Development Limited, the owner of Central Building. He personally spoke to Mr Tan in connection with the question of vacating the office at Central Building, and he said that Mr Tan knew where the second defendants were moving to. He went and inspected the building twice before he finalized the negotiation for the tenancy. When he went there, he saw a big signboard showing that Jones Lang Wootton were the marketing agent.

Mr Lee for the plaintiffs called Miss Leong Wee Teen, the legal manager of the first plaintiffs, to give evidence. Her evidence is not of great assistance as she joined the first plaintiffs only in October 1987. She testified that the plaintiffs' representatives inspected the building in January 1988 to ascertain who were in occupation of the building. They had to do the inspection because they could not obtain any information from Matterhorn. They called at every unit which was occupied and tried to ascertain who the occupants were and the terms under which they held tenancies. After the inspection, she gave instructions to the plaintiffs' solicitors to obtain possession of the units occupied.

I now turn to the affidavits filed and relied upon by the parties. There is no contentious issue on the primary facts deposed to in any of the affidavits. The plaintiffs are indisputably the mortgagees of the property, and copies of their mortgages were exhibited. The defendants, also indisputably, were the tenants of Matterhorn: they had each executed tenancy agreements of their respective units of the building and pursuant thereto had entered into possession thereof. During the period between January and November 1987, there were frequent advertisements in the newspapers of the building for renting inserted by property agents; some were inserted by Jones Lang Wootton and some by Richard Ellis. In most, if not all, of these advertisements the name of the building appeared jointly with, inter alia, the names of buildings owned by the Hong Leong Group, such as Hong Leong Building, Hong Leong Centre and City House.

On the first issue, I can find no evidence that the plaintiffs or either of them at or about the times when the tenancy agreements were made knew that Matterhorn had let or agreed to let the respective units to the defendants. But, the plaintiffs knew at all material times that Matterhorn were letting out or would be letting out or had let out parts of the building to tenants, and that those tenants who had taken up space in the building had incurred or would be incurring expenses in fitting up their respective offices. There is sufficient evidence from which I can draw this inference of knowledge on the part of the plaintiffs. In particular, there are the following primary facts which were not disputed on behalf of the plaintiffs:

(a) The plaintiffs financed the construction of the building, and are mortgagees thereof.
(b) The building was a newly-completed multi-storey commercial building for office purposes and is situate in the neighbourhood of Raffles Place and Collyer Quay.
(c) The renting or leasing of the building was freely and frequently advertised by property agents, namely, Jones Lang Wootton and Richard Ellis, between January and December 1987.
(d) The advertisement of letting of Matterhorn Building was published in numerous instances together with those of Hong Leong Building, Hong Leong Centre and City House, which are all owned by the Hong Leong Group.

However, I do not think that the plaintiffs knew (and certainly there is no evidence from which I can draw the inference that they knew) precisely who the tenants were and which parts of the building they actually occupied until their representatives carried out an inspection of the building in January 1988. Thenceforth, they knew substantially who were in occupation of the building. That, in totality, on the evidence before me, is all that I can say of the knowledge of the plaintiffs.

I now turn to the second issue. It was contended by Mr Karthigesu that the plaintiffs in this case have by their conduct been precluded from saying that they, the plaintiffs, have not consented to take the defendants as tenants and in consequence, from treating the defendants as trespassers. He relied on the following principle of law stated by Cross J (as he then was) in *Stroud Building Society* v *Delamont*[1] at p 751:

> ... When a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, instead of treating the tenant as a trespasser, consent to treat him as his own

tenant or he may act in such a way as precludes him from saying that he has not consented to take him as a tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy.

There, the mortgage of the property in question provided, inter alia, that no lease was to be granted by the mortgagor without the consent in writing of the mortgagee, the building society. However, without obtaining such consent the mortgagor granted a tenancy to W and later became a bankrupt. Subsequently, the mortgagee in exercise of the power appointed a receiver of the income of the mortgaged property, and the receiver requested W to pay the rent to him. On a later date, to an enquiry by W as to the terms and conditions of the tenancy, the mortgagee's solicitors replied that 'they were the same' as between W and the mortgagor. Three months later, the mortgagee sent to W a notice to quit the premises 'which you hold as tenant' of the mortgagee. W did not comply with the notice and the mortgagee brought proceedings for recovery of possession. It was held by Cross J that on the facts the mortgagee had by its conduct consented to accept W as its tenant. Cross J said, at p 752:

> ... I have to say whether (looking at the facts as a whole and putting myself in the position of a juryman) the society had consented to accept Mrs Waller as tenant notwithstanding the receivership or whether they had not. In my judgment the right inference to draw from all the facts is that the society had consented to accept Mrs Waller as a tenant.

The judgment of Cross J was approved by the Court of Appeal in *Chatsworth Properties Ltd* v *Effiom*,[2] which was also relied upon by counsel for the defendants. In that case, the mortgage by way of a legal charge contained a covenant by the mortgagors not to create any lease or under-lease or tenancy or otherwise part with possession of the whole or any part of the premises. The mortgagors defaulted under the terms of the tenancy and the mortgagees obtained an order for possession of the premises. That order, however, was not enforced. Subsequently, the mortgagors let the premises to the defendant in breach of the covenant. Later, the mortgagees appointed a receiver to receive income, rent and profits of the premises, and pursuant to the appointment the receiver collected rent from the defendant. The court found that the mortgagees had so conducted themselves that they were precluded from denying that they accepted the defendant as their tenant. The conduct consisted of principally a vital and crucial letter written by the mortgagees' solicitors to the defendant which informed the defendant of the appointment of a receiver of the income, rents and profits and said, amongst other things, the following:

> ... Please take notice that henceforth you should not pay any sums to your former landlords, Mr and Mrs Lamptey, but to Mr Richardson or to whom he shall direct.

On this letter, Salmon LJ (as he then was) said at p 607:

> ... The passage to which I draw particular attention is the passage in which the letter says 'henceforth you should not pay any sums to your former landlords, Mr and Mrs Lamptey'. I think that that can only mean, 'to the ordinary person, that Mr and Mrs Lamptey were no longer his landlords: the rent must be paid to Mr Richardson, presumably as agents for the landlord.' If any reasonable man received a letter such as that written on behalf of the plaintiffs, I think that he would come to the conclusion, a very sensible conclusion, that the letter was telling him not only that Mr and Mrs Lamptey had ceased to be his landlords but that the plaintiffs, on behalf of whom the letter was written, were his landlords and that they had appointed Mr Richardson to collect the rents from him on their behalf. Thereafter, without more ado, Mr Richardson collected the rent from the defendant in accordance with the terms of that letter. A new rent book was issued to the defendant describing the landlord as 'RC Richardson Receiver'. This in the circumstances would convey to the defendant only that Mr Richardson was the landlord's agent. In my view a fresh tenancy had indeed been created between the plaintiffs and the defendant; at any rate the plaintiffs are precluded from denying that they did become the defendant's landlord.

In each of these two cases, the mortgagees or their agents had done some positive acts and by these acts indicated that they had accepted the mortgagor's tenant or had consented to the tenancy created, in consequence of which a fresh tenancy was created between the tenant and the mortgagees. In this case, however, neither of the plaintiffs had done anything to indicate that they had consented to the tenancies or accepted the defendants or any of them as tenants. They merely stood by passively. It was argued on behalf of the defendants that the plaintiffs knew that the building was to be let out to diverse tenants; they knew of the creation of tenancies in favour of the defendants; though consent for such tenancies had not been given they had stood by and let the tenants incur expenses in fitting up the premises; they have therefore by necessary inference acquiesced in the tenancies and are precluded from treating the defendants as trespassers. This argument I am unable to accept. I do not think that there are sufficient primary facts before me from which I can reasonably draw the inference as urged upon me. In my judgment, the conduct of the plaintiffs fell short of constituting or amounting to any consent of or acquiescence in the tenancies created. To constitute such consent or acquiescence there must be some positive acts emanating from the plaintiffs or their agent from which one can reasonably infer that they have consented to or acquiesced in the tenancies. In this case, there were none.

In the Irish case, *In re O'Rourke's Estate*[3] at p 501, Monroe J said:

... I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor. The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he chooses to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find afterwards for his interest to repudiate it.

This passage of the judgment was quoted by Danckwerts J (presumably with approval) in the case of *Parker & Ors* v *Braithwaite & Anor*.[4] In that case, the mortgagor executed a mortgage of his dwelling house in favour of a building society. The mortgage contained the usual provisions excluding the mortgagor's statutory power of leasing except with the written consent of the building society. Subsequently, the mortgagor let out four rooms in his house to a tenant retaining the rest for his own occupation. The society was informed by its agent of this letting and also of the agreement between the mortgagor and the agent, that the agent should collect rent of the house, pay thereout the mortgage repayments, rates, insurance premiums and commission to himself and remit the balance to the mortgagor. The mortgagor at a later date vacated the house and the tenant thenceforth paid the rent for the whole house to the agent. The payment was subsequently suspended owing to a dispute, and thereupon the society initiated proceedings against the tenant for recovery of possession of the house treating the tenant as a trespasser. It was held that the failure by the society until a later date to evict the tenant as a trespasser did not amount to a recognition of the tenancy so as to deprive it of its right to possession. Danckwerts J found that the rents were collected by the agent not as the agent of the society but as the agent of the mortgagor and that no permission was given by the society to represent it in any way to the tenant that the mortgagor had permission to create the tenancy. He reviewed several authorities and came to the following conclusion at p 841:

The result of those authorities seems to me to be this. It is not to be denied that there may be cases where a mortgagee may so conduct himself as to confirm in some way a tenancy which has been created by the borrower in favour of a short-term tenant. It, no doubt, depends on the circumstances of the particular case whether that recognition of a tenancy has occurred, so that the mortgagee is bound to treat the tenancy as lawful against him and cannot evict the tenant, but otherwise it seems to me that, where the statutory power of leasing is exercisable only with the written consent of the mortgagee, a tenancy created by the mortgagor without that consent is not binding on the mortgagee. In the circumstances of the present case the mere refraining by the building society from taking action to evict the tenant and doing nothing for some eight months cannot amount to such recognition of the tenancy as to deprive them of their right to recover possession of the property, not only against the borrower, but also against the tenant who holds only by such right as the borrower would give her. Accordingly, it seems to me that there is no answer in this case to the claim to possession by the building society, and that the society is entitled to succeed.

Lastly, there was also a decision of Cross J in *Taylor* v *Ellis & Anor*[5] in which he reached the same conclusion as Danckwerts J. In that case, the mortgage contained a provision to the effect that no lease granted by the mortgagor should have any effect unless the mortgagee had consented to it in writing. A lease was granted by the mortgagor and it appeared that the consent of the mortgagee had not been given. But the mortgagee knew of the tenancy and allowed the tenant to remain in possession. Cross J, agreeing with the passage of the judgment of Monroe J in *In re O'Rourke's Estate*,[3] held that from that fact alone it could not be inferred that the mortgagee had consented to take the tenant as his tenant. He said at p 376:

... I think that it would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy - there is no doubt in this case, and it is accepted, that Thomas Taylor knew of the tenancy - that the mortgagee consented to take the tenant as his tenant.

Similarly, in this case, it would be quite wrong to infer from the evidence before me that the plaintiffs had consented to treat the defendants as their tenants. The plaintiffs themselves had done nothing on their part to indicate in the slightest way that they acquiesced in or consented to the tenancies. Hence, in my judgment, they are not precluded from treating the defendants as trespassers.

There remains the third issue which was raised by Mr Robert Wee. His argument, if I may summarize it, is briefly this. A mortgagor of registered land (ie land, the title of which is held under the Land Titles Act), as in this case, with the exception of lot 78-2, can create a valid tenancy of the land which he has mortgaged, notwithstanding that the mortgage contains a provision prohibiting the creation of such tenancy without the consent of the mortgagee, and in such a case the mortgagee of the land, unlike a mortgagee holding a common law mortgage, does not have the power to avoid such tenancy. The basis for this proposition is that a mortgage of registered land does not under s 63(3) of the Land Titles Act ('LTA') operate as a transfer of the legal estate to the mortgagee but as a security only, and the legal estate remains vested in the mortgagor. Such a mortgagor, being the legal owner, has all the powers of an owner and may grant a tenancy of the land, and is unlike a common law mortgagor who loses this right upon his execution of the mortgage which contains the prohibition. Further, the prohibition in the mortgage of registered land does not run with the land and is merely a contractual term and binds only the mortgagor and mortgagee, and not the tenant who is not a party to the mortgage. It follows, therefore, that a tenancy created by the mortgagor (even without the consent of the mortgagee) is valid and cannot be avoided by the mortgagee subsequently. Upon default by the mortgagor under the

terms of the mortgage, the mortgagee may under s 69(1) of the Act exercise his right to enter into possession of the mortgaged property as against the mortgagor and to receive rents from the tenants. He has no right to evict the tenants. His right is derived solely from that section and is of a different character from that of a mortgagee holding a common law mortgage. In support, he relied on the following passage of the judgment of the Court of Appeal in *Rimmon Watch Pte Ltd* v *Great Pacific Finance Ltd*[6] at p 267:

> In exercising his statutory power of entering into possession, a mortgagee under the Land Titles Act remains aloof from the legal estate. His right derives its force entirely from s 69 and is of a wholly different character from the legal mortgagee's right under common law title. The section makes no attempt to equate the position enjoyed by a mortgagee of Torrens title land with that of a mortgagee of land under common law title.

I am unable to accept such an argument, which, in my view, is plainly fallacious. First, under s 84(1) of the LTA, the provisions of Part IV of the Conveyancing and Law of Property Act ('CLPA') apply, mutatis mutandis, to mortgages and charges under the LTA. Section 23 of the CLPA (which is in Part IV) gives powers to a mortgagor to create, inter alia, an occupation lease of the mortgage property for a term not exceeding three years and the powers therein contained are expressly subject to the terms of the mortgage: see s 23(11) which provides:

> 23(11) This section shall apply only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

Secondly, it is clearly erroneous to say that the prohibition is purely contractual and does not run with the land. A term of the mortgage (which is registered) containing such prohibition is more than contractual; it runs with the land, and as the mortgage is registered under the LTA, any party dealing with the land has constructive notice of that term. Thirdly, under s 69(1) of the LTA, a mortgagee in the event of a default by the mortgagor under the mortgage, as had happened in this case, is entitled to enter into possession of the mortgaged property and may exercise such right by taking proceedings to recover possession of the mortgaged property not only from the mortgagor but also from a tenant of the mortgagor whose tenancy is not binding on the mortgagee. Section 69(1) provides as follows:

> If default is made in payment of the interest, principal or other money, secured by a mortgage or charge, or in payment of any part thereof, the mortgagee or chargee shall, as against the mortgagor or chargor and those claiming through or under him, be entitled to enter into possession of the mortgaged or charged land and to receive the rents and profits thereof.

By the express term of this provision the right to enter is exercisable by the mortgagee against the mortgagor and 'those claiming through or under him'; a tenant of a mortgagor whose tenancy is not binding on a mortgagee clearly comes within the category of persons 'claiming through or under' the mortgagor. Hence, a mortgagee in exercising such right is entitled to take action to evict such a tenant treating him as a trespasser.

The passage of the judgment of the Court of Appeal in *Rimmon Watch*[6] must be understood in the proper context. In that case, one of the arguments addressed to the court was that a mortgagee who has given consent to the creation of a tenancy upon taking possession of the mortgaged land inherits the reversion immediately expectant upon the termination of the tenancy and is subject to the burden of a covenant which runs with the reversion, such as a covenant for renewal of the lease. That argument was based on the premise that a mortgage of registered land is on the same footing as a legal mortgage of land held under common law. The court rejected that argument on the ground that in a mortgage of registered land, there is no transfer of the legal estate of the mortgaged property to the mortgagee by virtue of s 63(3) of the LTA as in the case of a mortgage at common law, and unlike the position at common law where the entitlement to take possession goes with the legal estate as of right, the entitlement of the mortgagee to take possession is derived solely from s 69(1) of the LTA. It is in that context that the passage of the judgment of the court must be understood. There is nothing in that judgment to say that in exercising his right under s 69(1) the mortgagee is not entitled to take proceedings to evict a trespasser, such as a tenant of a mortgagor whose tenancy was created in breach of the mortgage and was not consented to by the mortgagee. In my judgment, the position under the LTA, in so far as the point before me is concerned, is no different from the common law position.

In the result, the plaintiffs' claims against the defendants succeed. I was informed by counsel for the plaintiffs that the seventh, ninth, eleventh and twelfth defendants had moved out and vacated the premises which they previously occupied in the building. I therefore make no order for possession against these four defendants. I order that the second, third, fourth, fifth, sixth, eighth, tenth and thirteenth defendants deliver to the plaintiffs vacant possession of the respective units of the building occupied by them in terms of prayer (3) of the amended originating summons. As for mesne profits, I order that all the 12 defendants do pay to the plaintiffs mesne profits to be assessed by the registrar. I now wish to hear arguments on costs.

Application allowed.

Solicitors: *Allen & Gledhill*; *Tan Rajah & Cheah*; *David Fones & Co*; *Ho & Wee*.

Reported by *Terence Tan Bian Chye*